SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 226

SILVER, INC., a corporation, MOORE-ADDISON CO., a corporation, B S R (USA) LIMITED, a corporation, HABER CORPORATION, a corporation, SPIC & SPAN SERVICE STATIONS, INC., PAULINE HAFFA, DORA HAFFA, MAE HAFFA and TITUS HAFFA (being creditors), and DORA HAFFA, MAE HAFFA, PAULINE HAFFA, TITUS HAFFA, ETHEL HAFFA, EUGENE BERGERON and JACK M. LACHMANN (being Shareholders),

Petitioners,

v.

WEBCOR, INC., WEBCOR SALES COMPANY, INTERNATIONAL FASTENER RESEARCH CORPORATION, and DYNAMICS CORPORATION OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS INTERNATIONAL FASTENER RESEARCH CORPORATION and DYNAMICS CORPORATION OF AMERICA

MILES G. SEELEY
MILTON L. FISHER
Attorneys for Respondents International Fastener Research Corporation and Dynamics Corporation of America
231 South LaSalle Street
Chicago, Illinois 60604

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
Of Counsel

July 22, 1968

ARNOLD M. QUITTNER
Attorney for Respondent International Fastener Research Corporation
GENDEL, RASKOFF, SHAPIRO & QUITTNER
6380 Wilshire Boulevard,
Los Angeles, California 90048
Of Counsel

GEORGE J. WADE
Attorney for Respondent Dynamics Corporation of America
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza,
New York, New York 10005
Of Counsel

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JOINT BRIEF IN OPPOSITION FOR RESPONDENTS INTERNATIONAL FASTENER RESEARCH CORPORATION and DYNAMICS CORPORATION OF AMERICA

This Brief in opposition to the petition of certain stockholders and alleged creditors of two bankrupts for a writ of certiorari is submitted on behalf of the purchasers at a judicial sale which is sought to be undone. Also named as respondents are the two bankrupts most of whose assets were sold at the judicial sale.

INTRODUCTION

The Petition for Writ of Certiorari seeks review by this Court of the Order of the United States Court of Appeals for the Seventh Circuit entered on January 12, 1968. The opinion of the Court of Appeals is reported at 392 F. 2d 893 and is reprinted in Appendix A hereto because the opinion as appended to petitioners' brief contains typographical errors and substantial omissions. The judgment and opinion of the Court of Appeals determined six separate appeals from three separate orders affecting in identical fashion the bankrupt Webcor, Inc., and its subsidiary, the bankrupt Webcor Sales Company. The orders affirmed were:

1. The order of the District Court affirming on review the order of the Referee in Bankruptcy of November 7, 1967, approving and confirming a sale of the bankrupts' assets.

2. The order of the District Court affirming on review the order of the Referee in Bankruptcy dated November 7, 1967, denying the motion of the bankrupts to vacate the order of adjudication.

3. The order of the District Court entered November 21, 1967, affirming on review the order of the Referee in Bankruptcy announced November 21, 1967, denying a motion by the bankrupts to reconsider and vacate the Referee's order of November 7, which denied the motion of the bankrupts to vacate the order of adjudication.

COUNTERSTATEMENT OF THE CASE

The Trustee in Bankruptcy sold all of the assets of the bankrupt corporations at public auction after appro-

priate notice to creditors and others for a price far in excess of the court appraisal. The sale was recommended by the Official Creditors Committee. The Referee in Bankruptcy approved and confirmed the sale, and the bankrupts did not petition to review the order confirming sale. Certain stockholders and individual creditors of the bankrupts did petition to review the Referee's order and the District Court affirmed the Referee. The Court of Appeals then affirmed the orders of the District Court and of the Referee. During the pendency of the appeal, the appellants obtained a writ of supersedeas and a stay order which prevented the purchasers from obtaining possession and use of the assets. The Court of Appeals order of January 12, 1968, affirming the order of sale, vacated the supersedeas and the stay order. The petitioners did not attempt to obtain a further supersedeas or stay, and the purchasers took possession of the assets. The assets have been subsequently resold to various third parties or integrated into the purchasers' businesses and it is now impossible to restore the bankrupts to the status quo prevailing on the date of the Trustee's sale of the assets.

The judgment of the Court of Appeals also affirmed orders denying motions of the bankrupts to reconsider and to vacate final orders of the Referee adjudicating the debtors bankrupt.

The proceedings began July 5, 1967, with the filing by Webcor, Inc., and its wholly owned subsidiary of petitions for arrangement under the provisions of Chapter XI of the Bankruptcy Act. 11. U. S. C. § 722, 52 Stat. 907 (1938). The events which led up to the sale and the procedures followed below are fully and fairly stated by Judge Swygert in the Opinion of the Court of Appeals, Appendix A hereto. A further statement is not necessary except to note:

1. The repeated references in the Petition to the bankrupts as debtors and to the necessity for compliance with Chapter XI procedures distort the record. Rather, Webcor, Inc., and Webcor Sales Company had been adjudicated bankrupts and all of the proceedings and orders which were the subject of the appeals occurred and were entered after adjudication, in strict compliance with all applicable provisions of the Bankruptcy Act. It must also be mentioned that no one, not these petitioners nor anyone else, sought review of that order of adjudication.

2. At the judicial sale, although not required, all parties, including the bankrupts, were afforded the widest latitude in stating their views and offering potential solutions. Indeed, Judge Swygert noted the "commendable effort on [the Referee's] part to afford the fullest opportunity to the competing interests to be heard".

3. The statement that approval of the sale was based solely on the recommendations of the Creditors Committee is untrue and directly contrary to the findings of the Referee, the District Court and the Court of Appeals.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Petition herein does not present any question which is sufficiently special or important to warrant review by this Court. The only questions presented are:

1. Did the Referee in Bankruptcy act within his discretion in refusing to vacate an order adjudicating the debtors bankrupt?

2. Having adjudicated the debtors as bankrupt, having sent out notices of a judicial sale, having received bids of undeniably bona fide purchasers, may the Referee in Bankruptcy acting in his discretion confirm the sale to the highest bidder at a price $700,000 in excess of the independently assessed value of the property?

3. In the absence of fraud, or other circumstances indicating overreaching by the purchasers, may the Referee refuse to set aside his order confirming the sale?

ARGUMENT

I.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A JUDGMENT BASED ON CONSISTENT APPLICATION OF CORRECT PRINCIPLES OF LAW.

This case does not involve rules of law concerning which there is any conflict among the Courts of Appeals or between the decision below and applicable decisions of this Court. The Court of Appeals decision does not rest upon any unsettled questions of federal law. Rather, this case concerns the application of judicial discretion under well-settled principles of bankruptcy law.

A. Affirmance of the Denial of Rehearing of the Order of Adjudication was Proper.

On October 12, 1967, more than three months after the commencement of the arrangement proceedings, the Referee in Bankruptcy ordered the debtors to file any proposed plans of arrangement by October 25, 1967, and ordered a hearing for that date, upon notice to the debtors and creditors, to consider adjudication if the plans were not timely

filed. There were no objections to the order of October 12 and it became final on October 22, 1967. No plans of arrangement were filed by the debtors as required; accordingly, an order adjudging the debtors bankrupt was entered on October 25, 1967. None of the parties to the proceedings petitioned to review that order and it became final on November 6, 1967. Rather, on November 6, 1967, the bankrupts filed a motion before the Referee to reconsider the order of adjudication. After hearing argument, the Referee denied that motion.

Thus, Webcor, Inc., and Webcor Sales Company must be treated as bankrupts. The Referee's willingness thereafter to give consideration to a subsequently filed purported plan was only a matter of grace within his equitable discretion. Properly he considered it only as a circumstance bearing upon the exercise of his discretionary power to set aside the valid and final order of adjudication.

Petitioners' Point 1 rests upon the proposition that in Chapter XI cases this Court has held that "before liquidation could be ordered and efforts to rehabilitate called to a halt, the court had to make a determination that there was no possibility of rehabilitation and the financial life of the debtor was terminal", citing *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594, 618 (1965). Petition at 24. However, the sale of assets in this case took place in bankruptcy and not under Chapter XI, as the Court of Appeals recognized. The proceedings below were held pursuant to 11 U. S. C. § 776 which specifically provides that, in cases where an arrangement has not been proposed within the time fixed by the court, the court may adjudicate the debtor a bankrupt and direct that proceedings in bankruptcy take place. *American Trailer*, on the other hand, was a proceeding conducted pursuant to Chapter XI. There had not been an adjudication of bankruptcy and the question

presented to this Court was whether the proceeding should more properly have been conducted under Chapter X, as the more appropriate chapter for the reorganization of a publicly held corporation.

Equally inapposite are *General Stores Corp.* v. *Shlensky,* 350 U. S. 462 (1956); *In re Riddlesburg Mining Co.,* 224 F. 2d 834 (3d Cir. 1955); and *John Hancock Mut. Life Ins. Co.* v. *Casey,* 141 F. 2d 104 (1st Cir.), *cert. denied,* 323 U. S. 713 (1944). The latter two cases were cited at page 24 of the Petition for the proposition that in every case where there had been an adjudication there had been a finding that rehabilitation was impossible. But the courts in those two cases did not have occasion to consider that question. The Bankruptcy Act, while providing certain criteria for liquidations and sales of assets, contains no such requirement.

Section 376 of the Bankruptcy Act, 11 U. S. C. § 776, as amended in 1952, specifically provides that petitions for an arrangement *shall* be dismissed in certain specific eventualities: (a) if the schedules and statement of affairs are not duly filed (they were filed in this case, if quite late); (b) if an arrangement is not proposed in the manner and within the time fixed by the Court (the Court here fixed the time and manner and a plan was not filed); (c) if an arrangement is withdrawn or abandoned prior to its acceptance (it was not even filed in this case); (d) if it is not accepted at the meeting of creditors called to consider it (the Creditors Committee specifically recommended that bankruptcy be proceeded with and the assets sold) or (e) if the money or other consideration required to be deposited is not deposited (no deposit was suggested before adjudication; the deposit volunteered by petitioners was not made until after entry of the orders complained of). Thus, the Referee was under a statutory requirement to order adjudi-

cation; as a matter of grace only, he permitted petitioners the widest latitude to propose a possible plan.

In any event, an order denying a motion to vacate an order of adjudication is not appealable. *Metal Fabricators, Inc.* v. *Granite City Steel Co.,* 357 F. 2d 175 (8th Cir. 1966); *Hoover* v. *Hockenberry,* 100 F. 2d 87 (3d Cir. 1938). Motions to vacate orders, motions for rehearing and like motions are addressed to the discretion of the trial court and orders granting or denying such motions are not appealable. *Conboy* v. *First National Bank,* 203 U. S. 141, 145 (1906); *In re L. F. Grammes & Sons, Inc.,* 324 F. 2d 675 (3d Cir. 1963); *In re Marachowsky Stores Co.,* 188 F. 2d 686 (7th Cir. 1951).

B. Affirmance of the Referee's Order of Confirmation Was Proper Because the Referee Acted Within His Discretion in Confirming the Sale.

The general principles which govern the exercise of discretion in rejecting or confirming a sale to the highest bidder at a public sale are well settled. The decision of the Referee in Bankruptcy is reversible only if an abuse of discretion is shown. That discretion is necessarily wide because of the administrative nature of bankruptcy proceedings and its close contact with the commercial world. When that discretion has been specifically concurred in by the District Judge and the Court of Appeals, the administration of the bankruptcy laws requires that the sale not be upset. *See* 4A COLLIER, BANKRUPTCY 1181-82 (14th ed. 1967).

The theory of the courts has been that judicial sales, fairly and lawfully conducted, must be confirmed in order to insure the stability of such sales and, thus, to stimulate participation in them. *See Pewabic Mining Co.* v. *Mason,* 145 U. S. 349 (1892). As the Third Circuit long ago said in *Jacobsohn* v. *Larkey,* 245 F. 538, 541 (3d Cir. 1917):

> "Judicial sales are an indispensable part of the machinery employed in administering bankrupt estates. Public policy requires stability in such sales. The Ruby (D. C.) 38 Fed. 622; In re Burr, 217 Fed. 16, 19, 133 C. C. A. 126. To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final, Tewabic [sic] Mining Co. v. Mason, 145 U. S. 349, 356, 12 Sup. Ct. 887, 36 L. Ed. 732; they are not to be disturbed except for substantial reasons."

The Courts of Appeals have continued the *Pewabic-Jacobsohn* rationale. In *Currin* v. *Nourse,* 66 F. 2d 137, 140 (8th Cir. 1933), the court, after quoting with approval the opinion in *Jacobsohn,* stated:

> "An appellate tribunal is precluded from revising the exercise of discretion in setting aside a judicial sale by a court having equitable jurisdiction, unless there is an abuse of power, or the case is in other respects extreme. In re Shea (C. C. A. 1) 126 F. 153, 156; In re Wolke Lead Batteries Co. (C. C. A. 6) 294 F. 509, 511; Century Motor Truck Co. v. Noyes (C. C. A. 1) 18 F. (2d) 546, 547. The same rule would apply to the proper exercise of discretion in confirming a sale."

As the Fifth Circuit wrote in *St. Regis Paper Co.* v. *Jackson,* 369 F. 2d 136, 142 (5th Cir. 1966):

> "The finality of these orders and transactions has a commercial value. For example, the more certain it is that a sale yields unimpeachable title the higher the price will be. A buyer will pay more for an object than he will for a lawsuit over that object."

The line of cases has come down to the present day and is concurred in by each of those Courts of Appeals which have had occasion to consider the problem. *E. g., Knight* v. *Wertheim & Co.*, 158 F. 2d 838, 843 (2d Cir. 1946), *cert. denied,* 331 U. S. 818 (1947); *In re Stanley Engineering Corp.*, 164 F. 2d 316, 319 (3d Cir. 1947), *cert. denied,* 332 U. S. 847 (1948); *In re Marathon Foundry & Machine Co.*, 228 F. 2d 594 (7th Cir. 1955), *cert. denied,* 350 U. S. 1014 (1956).

The citation by petitioners of *In re Pure Penn Petroleum Co.*, 188 F. 2d 851 (2d Cir. 1951), is not applicable to the facts of this case. There the Court of Appeals reversed the Referee's order of sale and remanded, not because an order of adjudication had been improvidently entered, but because the court had failed to enter an order of adjudication and, therefore, had failed to provide for the protective devices which surround a bankruptcy sale including a public auction, advertising, court appraisals, and negotiations and a sale by a trustee or a receiver. In the case now before this Court, each of the safeguards found missing in *Pure Penn* is present and, instead of the assets having been sold for approximately 6% of their value, the assets have been sold to Respondents for over $700,000 more than their appraised value.

Petitioners' Point 2 rests on the proposition that the Referee abdicated his judicial responsibility by basing his rejection of the plan solely upon the recommendation of the Creditors Committee. Whatever may be the merits of the legal proposition that the Referee must act independently of such a Creditors Committee, each of the courts below has found that the Referee did so act. *See infra* at 11a, n. 13. The fact is that the Referee acted independently, noting that the Committee apparently agreed

with him. Further, whatever were the views of the various individual members of the Committee present at the sale, the full Committee the previous business day had voted unanimously not to approve any plan of arrangement which did not have an immediate cash deposit, and there was no such immediate cash deposit.

C. Affirmance of Denial of Reconsideration of Order Confirming the Sale was Proper, No Fraud or Any Other Overreaching During the Sale Having Been Asserted.

This case presented the Court of Appeals with two separate legal standards to be applied to the same fact situation. (a) On appeal, an order confirming sale may be reversed for abuse of discretion. (b) An order confirming sale may be set aside by the Referee only if there is fraud or overreaching. Thus, the Court of Appeals found no abuse of discretion and held that the Referee properly confirmed the sale. It further found that there was no allegation of fraud or overreaching and held that the Referee properly denied the motion to set aside the sale. Petitioners have continuously confused those two concepts and holdings. Thus, the somewhat shrill complaint of the petitioners that the decision below is in conflict with every other Court of Appeals decision on the subject is inaccurate and represents a confusion of those two holdings.

Further, the reliance of petitioners on *In re Solar Mfg. Corp.*, 176 F. 2d 493 (3d Cir. 1949), is misplaced. *Solar* involved a private sale of assets in a Chapter X proceeding at a price far below the indicated or appraised value. The sale was set aside because it had not been surrounded by the safeguards of a public sale and an appraisal, both of which safeguards were observed in this case.

II.

THERE IS NO PRACTICAL OCCASION OR REASON FOR REVIEW OF THIS CASE BY THIS COURT.

The sale challenged by petitioners was confirmed on November 7, 1967, and possession of the assets sold was finally taken after all court stays had been removed on January 12, 1968. The physical assets have been removed from the bankrupts' leasehold and disposed of by the purchasers. Petitioners did not seek any expedition of the rehearing by the Court of Appeals or of the petition for certiorari. Rather, after receiving one extension, they permitted the mandate of the Court of Appeals to be issued and waited until almost the last day to file this petition for a writ of certiorari.

Even if certiorari should be granted and the case remanded to the Bankruptcy Court for further proceedings, the physical assets could not be restored to their former state. Most of the tangible assets have been sold to third parties or mingled with other assets of the purchasers. Even in the case of intangibles such as the trade names which were transferred, the uncertainty which would be created would in all likelihood permanently destroy the value of the goodwill attached to the names and marks.

CONCLUSION

This case received the most careful consideration by three courts below, the Referee in Bankruptcy, the District Court and the Court of Appeals. It does not present any novel questions, but merely the application of well-settled principles of law to a particular fact situation. As the Court of Appeals noted, the Referee acted prudently and discreetly.

Further, this Court, in order to upset the sale, would have to undermine important interests which have vested in the purchasers, commercial entities who responded to the solicitation of the Trustee for bids. Judicial sales must be recognized as final and certain, if they are to perform their function as the best method of getting the highest price for assets to be sold.

This petition for a writ of certiorari should be denied.

July 22, 1968

Respectfully submitted,

MILES G. SEELEY

MILTON L. FISHER

Attorneys for Respondents International Fastener Research Corporation and Dynamics Corporation of America

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604,
Of Counsel

ARNOLD M. QUITTNER

Attorney for Respondent International Fastener Research Corporation

GENDEL, RASKOFF, SHAPIRO & QUITTNER
6380 Wilshire Boulevard
Los Angeles, California 90048,
Of Counsel

GEORGE J. WADE

Attorney for Respondent Dynamics Corporation of America

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005,

Of Counsel